

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAYONTE DAESKIO MABINS,

Defendant-Appellant.

UNPUBLISHED

June 24, 2010

No. 290792

Wayne Circuit Court

LC No. 08-005674

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAYONTE DAESKIO MABINS,

Defendant-Appellant.

No. 290793

Wayne Circuit Court

LC No. 08-005675

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAYONTE DAESKIO MABINS,

Defendant-Appellant.

No. 290794

Wayne Circuit Court

LC No. 08-018276

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAYONTE DAESKIO MABINS,

No. 290795

Wayne Circuit Court

LC No. 08-018278

Defendant-Appellant.

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Defendant was charged with several offenses in four separate cases, each involving a different victim, that were consolidated for trial before a single jury. The jury convicted defendant of a total of nine counts, specifically, one count each of carjacking, MCL 750.529a, and armed robbery, MCL 750.529, two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), three counts of unarmed robbery, MCL 769.30, and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to prison terms of 18-3/4 to 37-1/2 years for the carjacking conviction, 15 to 30 years for the armed robbery conviction, 23-3/4 to 47-1/2 years for each first-degree CSC conviction, 5 to 15 years for each unarmed robbery conviction, and five to ten years for each assault conviction.¹ Defendant appeals as of right. We affirm.

Defendant was charged with physically and sexually assaulting, and also robbing, four female victims, each of whom defendant met at a bar or nightclub in Detroit. The prosecution's theory at trial was that defendant had a common plan or scheme whereby he would meet women at a bar or nightclub, gain their trust so that they would leave with defendant or agree to meet with him alone, and then defendant would sexually and physically assault them, and also rob them. The defense theory at trial was that the female victims agreed to engage in consensual sex with defendant in exchange for money, but then became angry with defendant when he refused to pay them the agreed amount. The trial court allowed the evidence of defendant's acts against each victim to be considered in relation to the charges involving each other victim pursuant to MRE 404(b)(1). The court also admitted evidence of defendant's prior assaultive acts against a former girlfriend under MRE 404(b)(1).

I. THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES

On appeal, defendant first challenges the prosecutor's use of a peremptory challenge to excuse an African-American juror. Defendant argues that the juror was excused because of her race, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), mod *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991). This Court reviews "for clear error a trial court's decision on the ultimate question of discriminatory intent under *Batson*." *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005). Issues regarding a trial court's proper application of the law are reviewed de novo. *Id.*

¹ The carjacking sentence was ordered to be served consecutive to the two first-degree CSC sentences, and all other sentences were to be served concurrently.

In *Bell*, our Supreme Court addressed the procedure for analyzing a defendant's claim that a prosecutor improperly used a peremptory challenge in a discriminatory manner, contrary to *Batson*. The Court stated:

In *Batson*, the United States Supreme Court made it clear that a peremptory challenge to strike a juror may not be exercised on the basis of race. *Batson*, *supra* at 89, 96-98. The prosecution in *Batson* attempted to exclude African-American jurors solely on the basis of their race. *Id.* at 82-83. The Court determined that the prosecution's actions violated the Equal Protection Clause. It set forth a three-step process for determining an improper exercise of peremptory challenges. First, there must be a prima facie showing of discrimination based on race. *Id.* at 94-97. To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. *Id.* at 96. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made. *Id.*

Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. *Id.* at 97. The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. *Id.* at 97-98. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied. *Id.* at 100.

Finally, the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination. *Id.* at 98. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination "comes down to whether the trial court finds the . . . race-neutral explanations to be credible." *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003). The Court further stated, "Credibility can be measured by, among other factors, the . . . [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.* at 339. If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. *Batson*, *supra* at 100. [*Bell*, 473 Mich at 282-283.]

In this case, the trial court appears to have found that defendant, who is African-American, made a prima facie showing of a *Batson* violation because it asked the prosecutor to provide a race-neutral reason for her use of a peremptory challenge to excuse an African-American juror. The prosecutor explained that the case involved four young victims who voluntarily agreed to meet with defendant alone after meeting him at a bar or nightclub, where the victims presumably were drinking despite most of them being under the legal drinking age, and that she excused the juror in question because the juror was a much older woman who might not identify with the victims' conduct or situation. The prosecutor also noted that there were three other African-Americans on the jury whom she had not excused. The trial court denied

defendant's *Batson* challenge. In doing so, the court commented on the fact that the excused juror was replaced by another African-American juror who had not been excused.

The prosecutor appropriately responded to defendant's *Batson* challenge by offering race-neutral reasons for excusing the juror in question. *Bell*, 473 Mich at 283. Thus, the matter hinged on the credibility of the prosecutor's proffered reasons. *Id.* We cannot say that the trial court clearly erred in finding that the prosecutor's race-neutral reasons for excusing the juror were credible. Defendant makes much of the trial court's comment that the dismissed juror was replaced by another African-American. As defendant observes, under *Batson*, the striking of a single juror for racial reasons violates the Equal Protection Clause, even if other jurors of the same race are seated. *United States v Battle*, 836 F2d 1084, 1086 (CA 8, 1987). We agree with defendant that if the prosecutor engaged in discriminatory conduct by striking the juror in question on the basis of her race, that taint would not dissipate because she was replaced by another juror of the same race. See *Lancaster v Adams*, 324 F3d 423, 434 (CA 6, 2003); *United States v Harris*, 192 F3d 580, 587 (CA 6, 1999); *Battle*, 836 F2d at 1086. Here, however, the record indicates that the trial court considered the race of the replacement juror only as one factor in evaluating the credibility of the prosecutor's proffered race-neutral reasons for excusing the juror. Thus, the court did not determine that the prosecutor had improperly excused the juror on the basis of her race.

Accordingly, we find no clear error in the trial court's denial of defendant's *Batson* challenge.

II. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor engaged in misconduct by introducing evidence of his prior conviction for aggravated assault against his former girlfriend without establishing the admissibility of that conviction under MRE 609, and further, by commenting on the prior conviction and the evidence of his other bad acts for the improper purpose of suggesting that he should be convicted because he was a bad person. Because defendant did not raise any objection based on MRE 609, or object to the prosecutor's comments, this issue is not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003).

Defendant's reliance on MRE 609 is misplaced. As our Supreme Court observed in *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985), evidence of a prior conviction may be admissible without regard to MRE 609 "if it is being offered for some proper purpose other than to impeach a defendant's credibility in general." One such purpose is "to rebut specific statements of the defendant who testifies at trial." *Id.* In this case, defendant testified that he only emotionally harmed his former girlfriend by cheating on her. Defendant denied ever physically harming his former girlfriend. The evidence that defendant had been convicted of aggravated assault arising from a physical assault of his former girlfriend was admissible to rebut defendant's specific testimony that he had never physically harmed his former girlfriend. Thus, introduction of the conviction for this purpose was not plain error.

Defendant also argues that the prosecutor's comments during closing arguments improperly urged the jury to consider the evidence of his other bad acts for purposes beyond the limited purposes for which the evidence was offered under MRE 404(B)(1). He contends that

the prosecutor's arguments improperly urged the jury to convict him because of his bad character. We disagree.

Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A prosecutor is afforded great latitude during closing argument. The prosecutor is permitted to argue the evidence and make reasonable inferences arising from the evidence to support her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors may use "hard language" when the evidence supports it, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). The prosecutor must refrain from making prejudicial remarks. *Bahoda*, 448 Mich at 283. But a prosecutor's comments must also be considered in light of the defense arguments raised. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal where they are made in response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant challenges the emphasized remarks in the following portion of the prosecutor's closing rebuttal argument:

That's the person [defendant] that you're suppose to believe. That's the person that defense counsel wants you to believe. Holy incredible. The defendant tells you, I love women. I love 'em. Love women. Went down to Alabama, loved them so much caught myself a case down there. Lost my ride.

Came back up here, busted the leg of a girlfriend that I used to date. But I love 'em. You heard him on the jail tape talking to this female friend. I was just stressed. I'm over at the jail. I'm stressed.

But it shows just how quickly he goes from zero to extremely angry. At the drop of a hat. It's a small glimpse of what these poor women saw on the nights that they were sexually assaulted by the defendant. A small glimpse.

He calls them nasty, freaks, chicks. That's the person that you're suppose to believe. That's the credible person. Not these five women who come in here and talk about the most disgusting acts that have ever happened to them. The most personal acts.

Contrary to what defendant argues, the prosecutor did not ask the jury to convict defendant because of his propensity and character toward violence, and because he was a bad man who should be convicted. Rather, the prosecutor's arguments were directed at credibility. Viewed in context, the prosecutor was commenting on the credibility of defendant's testimony that he was a person who loved women, and responding to defense counsel's argument that the female victims were not credible. The prosecutor argued that defendant's aggravated assault of his former girlfriend showed that defendant's testimony that he loved women was not truthful. The prosecutor also referred to a recorded conversation between defendant and his current girlfriend in which defendant suddenly became angry, and argued that this evidence was

consistent with the victims' accounts of their experiences with defendant, thereby enhancing their credibility. There was no plain error in the prosecutor's remarks.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher